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No. 336

In the Supreme Court of the United States

OCTOBER TERM, 1940

LEROY A. BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 383) is reported in 111 F. (2d) 615.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 15, 1940 (R. 387). The petition for a writ of certiorari was filed on August 14, 1940, and was granted on October 21, 1940. The jurisdiction of this Court rests on Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondent at the close of the case moved for a directed verdict on the ground that there was no substantial evidence to support a verdict that that petitioner became totally and permanently disabled while his insurance policies were in force. It made no motion after verdict, under Rule 50 (b), for a judgment in accordance with its earlier motion. Judgment was entered on the verdict. The questions are:

1. Whether there is any substantial evidence to support the verdict.

2. If not, whether the circuit court of appeals in reversing has discretion to (a) direct entry of judgment for respondent, (b) direct a new trial, or (c) remand for action by the district court on opposing motions for judgment and for new trial; and whether in this case it properly directed dismissal of the petition.

PERTINENT REGULATIONS AND RULES

The contracts sued on were in the form of a regulation promulgated on October 15, 1917 (Bulletin No. 1, Treasury Department, Regulations & Procedure, United States Veterans' Bureau, Vol. II, pp. 1233–1237), which was issued pursuant to statutory authorization (c. 105, Sec. 402; 40 Stat. 409); it provided, so far as here pertinent, for payment to the insured of monthly benefits at

the rate of $5.75 for each $1,000 of insurance, in the event he became totally and permanently disabled while the insurance was in force.

By regulation issued on March 9, 1918 (Treasury Decision No. 20, Regulations & Procedure, United States Veterans' Bureau, Vol. 1, p. 9), total and permanent disability was defined as:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

Rule 50 (b) of the Rules of Civil Procedure for the District Courts of the United States provides:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accord-

ance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

STATEMENT

On April 6, 1936, the petitioner, Leroy A. Berry, filed a petition in the United States District Court for the District of Vermont, to recover total permanent disability benefits under two contracts of yearly renewable term insurance. The policies, both providing protection against total permanent disability, were issued to petitioner by respondent on December 1, 1917, and April 12, 1918, respectively, and premiums were paid on them through the month of July 1919. Insurance protection under both policies expired on August 31, 1919, the date of expiration of the grace period for payment of the premiums due on August 1, 1919. (R. 1, 3–6, 193.) In the District Court, the petitioner alleged (R. 3–4), and the respondent denied (R. 8), that he became totally permanently disabled while the policies were in force. No other issue was raised.

The case was tried twice. In the first trial, concluded on November 18, 1937, the jury reported a disagreement (R. 1). After introduction of all the evidence at the second trial in March 1939, respondent moved for a directed verdict on the ground that there was no substantial evidence to show the alleged total [illegible]manent disability. The motion was denied (R. 25[illegible] 1). Upon a verdict thereafter returned for petitioner (R. 258, 368), judgment was entered in his favor (R. 369). Neither a motion for judgment notwithstanding the verdict, nor a motion for a new trial, was made in the District Court.

Respondent appealed to the Circuit Court of Appeals for the Second Circuit, assigning error to the denial of its motion for a directed verdict, and praying reversal of the judgment (R. 370, 376–380). The Circuit Court of Appeals held that subsequent to the alleged date of total permanent disability the petitioner had followed a substantially gainful occupation under circumstances conclusively refuting any inference that he was totally and permanently disabled, and that, accordingly, respondent's motion for a directed verdict should have been granted (R. 383–386). The Circuit Court of Appeals reversed the judgment with instructions to dismiss the petition (R. 387).

SUMMARY OF ARGUMENT

I

The Circuit Court of Appeals properly held that respondent's motion for a directed verdict should have been granted because undisputed evidence showed that petitioner for considerable periods of time had engaged in substantially gainful employment without injury to his health for almost twenty years following the alleged date of total permanent disability. Throughout this period, petitioner repeatedly declared himself to be in sound health. This evidence conclusively negative his claim, essential to the recovery sought, that he became totally permanently disabled prior to the performance of such work.

II

A. The direction by the circuit court of appeals that the petition be dismissed raises no question under the Seventh Amendment. Rule 50 (b) of the Federal Rules of Civil Procedure adapts to routine practice the common law reservation of ruling on a motion for directed verdict (*Baltimore & C. Line* v. *Redman,* 295 U. S. 654) and therefore is not forbidden by the Constitution. *Montgomery Ward & Co.* v. *Duncan,* No. 30, this Term.

B. Irrespective of a post-verdict motion in the district court, we submit that the disposition of the case should lie within the discretion of the circuit court of appeals which reverses for failure to

grant the motion for a directed verdict. (1) Rule 50 (b) undoubtedly contemplates that the parties should move to set aside the verdict and to have judgment entered in accordance with the motion for a directed verdict. Such a motion is not an indispensable condition to the power of the district court, but seems a necessary part of orderly practice. (2) However, this conclusion does not mean that the appellate court is helpless to dispose of the case as justice and expedition should require. The authorities are equivocal as to whether a post-verdict motion is necessary to the power of the appellate court to direct entry of judgment. We think the best rule to be one which permits the circuit court of appeals in its discretion, according as the circumstances of the particular case may indicate, (a) to direct a new trial, (b) to direct entry of judgment for the appellant, or (c) to remand the case to the district court with directions to determine whether or not judgment should be entered or a new trial granted.

C. If the question is within the discretion of the circuit court of appeals, its order directing entry of judgment is probably not reviewable here. But if, because this Court has before it the whole record, it cares to reach its own conclusion, the circumstances of this case permit no alternative but a direction to enter judgment. The work record of the petitioner conclusively shows that he was not totally and permanently disabled while the in-

surance policies were in force, and there is nothing to suggest that considerations of fairness would require a new trial.

D. Even if the Circuit Court of Appeals, because of the failure of the respondent to make a post-verdict motion for judgment notwithstanding, was ordinarily powerless to direct entry of judgment, it had that power here because the failure of the district court on its own motion to enter judgment notwithstanding the verdict was plain error.

ARGUMENT

I

THE DISTRICT COURT SHOULD HAVE GRANTED THE RESPONDENT'S MOTION FOR A DIRECTED VERDICT

It is, we think, abundantly plain that there is no substantial evidence to support the verdict (R. 258) that the petitioner has been permanently and totally disabled since June 16, 1918. The respondent's motion for a directed verdict, made at the close of all the evidence (R. 250), should therefore have been granted, and the circuit court of appeals properly reversed the decision of the district court which denied that motion.

1. *The Evidence.*—On June 16, 1918, fragments of high-explosive shells inflicted wounds to petitioner's left leg near the ankle, to his right thigh, and to several spots in the region of his right ear, arm, and shoulder (R. 14–16). His left leg was amputated about 6 inches below the knee (R. 268, 296).

On the right thigh muscle tissue only was affected, and after removal of a foreign body on June 27, 1918 the wound became completely healed, leaving considerable scar tissue, but no injury to nerves, vessels, or bones, and no impairment of function of the right leg (R. 268, 275–276). The wounds to the neck and shoulder left no permanent injury and appear to have healed promptly. The scars were not noted by a number of medical examiners, and were described by a medical examiner in 1930 as "superficial * * * None of these are giving any trouble" (R. 276).

Plaintiff was provided with an artificial limb while in the military service, and when discharged therefrom on January 2, 1919, his disability was regarded by examining physicians as 50%, by reason of the amputation of the left leg (R. 301). Except for the amputation, he was found to be physically and mentally sound (R. 287–288).

Dr. Tierney, whom petitioner had called as a witness, examined him a number of times during 1920 and 1921, and apparently treated an abscess on the stump of his amputated leg in December 1921 (R. 160). In a written report of his examination of petitioner made on July 16, 1920, Dr. Tierney stated that the stump of the left leg had healed and was not painful on pressure; that the prognosis was excellent; and that while petitioner's vocational handicap was major, vocational training was regarded as feasible (R. 259–260).

Prior to the date of this report, petitioner had engaged in vocational training in photography from May 14 to September 10, 1919, and again from September 22 to November 18, 1919 (R. 343, 357). He testified that he completed the course (R. 132, 330). He did not accept a position in a studio, obtained for him by vocational training officials, because, he testified, he could not do the retouching required (R. 133).

In response to the petitioner's insistent request (R. 344), he was granted another course in vocational training as an automobile mechanic, which he pursued from January 1921 to April 1923 (R. 344, 364). He was trained in private garages, receiving pay in part from the shop owners and in part from the Government (R. 319, 344–366). Statistical records of this training (R. 344–364) show that during this period of over two years [1] petitioner was absent from work an aggregate of 80½ days. Of that time, 41½ days absence were due to influenza, personal business, injury to his arm while cranking a car, and other reasons plainly not attributable to any permanent disability (R. 346–347, 347–348, 349, 356, 358, 360, 362). Absences for treatment of his amputated leg accounted for 4 days (R. 346, 354); 15 days absence was due to trouble with the leg (R. 352);

[1] The supervision reports in the record, however, do not cover an aggregate of two to four months during this period. See R. 346–348; 349, 351; 358–359.

an additional 13 days absence may have been due to this cause (R. 351, 359); and no reason was stated for the balance of 7 days (R. 353, 355, 356). He completed his vocational training at the St. Johnsbury Garage on April 15, 1923, but was retained there as an employee, receiving full pay from the shop owner until about January 1924 (R. 364, 335).

On July 25, 1923, a vocational training supervisor reported, "Man rehabilitated as auto mechanic. Working for the St. Johnsbury Garage where he finished his training. Is doing good work and is well liked" (R. 366), and on October 19, 1923, the training supervisor reported, "Working for the St. Johnsbury Garage, St. Johnsbury, Vt. Doing well. Receiving $25.00 per week salary" (R. 366). All witnesses interrogated with respect to the result of petitioner's vocational training testified that he became a well-trained and competent mechanic (R. 63, 106, 108, 237). His employers testified that the work he performed was very satisfactory (R. 237, 240).

From 1924 to 1928, he was living on a farm. He testified that he did very little of the farm work (R. 37). However, he received an income during this period of approximately $700 for a part (R. 151) of his milk and butterfat, which he sold to the Lyndonville Creamery (R. 213).

There is only fragmentary evidence of petitioner's employment between January 1924 and Feb-

ruary 1930. But petitioner's written summary, doubtless overstated, as contained in his application for an indemnity bond, executed on February 14, 1940, is as follows (R. 335):

> Jan. 1924 to May 1928, Prop., Sheffield, Vt., Berry Garage, Sheffield, Vt. May 1928 to Jan. 1929, Mechanic, Lyndonville, Vt., J. E. Nadeau, Depot Garage, Lyndonville, Vt. Jan. 1929 to Jan. 1930, Prop., Lyndonville, Vt., South End Garage, Lyndonville, Vt. Jan. 1930 to Feb. 1930, Salesman, Lyndonville, Vt., L. D. Ratta, Air-Ways, Inc., Manchester, N. H.

From February 14 to December 31, 1930, petitioner was employed on a commission basis as a salesman for the Aluminum Cooking Utensil Company (R. 244). During this period he made gross sales in the amount of $2,194.00, of which he retained as commission 30% or 40%; he averaged about 4½ working days a week (R. 246–248). Measured by the production of about 1,000 salesmen contemporaneously employed by the company, and considering his inexperience and the amount of time devoted to the work, petitioner's sales were "average" (R. 247). In this work, prospective purchasers were assembled at dinners served to groups of people at the home of one of them. Petitioner's wife described the manner in which this work was conducted as follows (R. 249):

> Mr. Berry usually took his car and went out and made the arrangements for the

> supper * * * we would go and get there about five o'clock and put on potatoes, meat, vegetables—or I fixed those and he talked to this lady about the supper—* * * I watched them cooking to see they were coming along all right, and the people would come about seven o'clock. In the meantime I would set the table—if the hostess didn't have that already done—* * * He used to carve the meat if she wished that it be done in the kitchen, and we served the supper. There was a moving picture machine went along with this. When he gave the sales talk I cleared up the dining room table and done up the dishes—done up our dishes so they were clean for inspection, and then done up her dishes. While they were in the living room he would hang up the curtain and give a very interesting sales talk. He could do that, and I did the work in the kitchen. He made arrangements with each couple to call on them within the next day or two * * * and if he wasn't able to drive the car I would drive the car and he made the call. He done the talking and I done the work.

Between December 1930 and the date of trial, petitioner sold spot remover, vacuum cleaners, wrenches, flavoring extracts, and cheese and butter, each for a short period (R. 40, 155); worked for a week or so repairing and running an air compressor on a P. W. A. project (R. 41); drove a truck hauling stone (R. 109, 232) and logs (R. 207) for a few

months (R. 151); worked for wages in a service station (R. 48–49); did a few special repair jobs at his home for acquaintances (R. 225); and ran a filling station of his own for about six months (R. 42, 155).

Petitioner was issued an automobile driver's permit each year from 1920 to 1939. Until 1926, when the issuance of professional permits was discontinued, petitioner's permit was of the professional class entitling him to operate vehicles for commercial purposes (R. 136–137, 242, 327).

At the time of his discharge from service, he claimed no disability other than the loss of his left leg (R. 286); he asserted no other claim in his application for compensation executed on June 6, 1919 (R. 331); and in his several applications for a driver's permit between 1934 and 1939 he certified that he had no other disability (R. 321–325).

He applied for and received two policies of insurance with private insurance companies (R. 139, 140–143), and in one of these applications, executed in 1928, he certified that he was in good health, having no physical or mental infirmity other than the loss of his left leg (R. 338, 340); that he had received no medical treatment during the preceding five years, except an appendectomy in April 1928; and that during the preceding five years he had lost time from work by reason of illness only at the time of the appendectomy (R. 339).

Each month since his discharge from service, petitioner has been paid compensation by the Gov-

ernment in amounts which have increased from $30 to $140 a month; at the time of trial they aggregated approximately $16,800 (R. 319).

Petitioner's evidence shows that he has suffered severe pain because of nerve abscesses on the stump of his left leg, so that throughout his various employments his work was interrupted by nervous illness or soreness of the leg (R. 34, 38–43, 107); and that he abandoned most of these occupations either because he was unable to continue or because the employer considered his working time too irregular (R. 35–43, 102, 107, 216).

Petitioner and lay witnesses testified to observing blisters and abcesses on the stump of petitioner's amputated leg at various times since 1919 (R. 38, 42, 43, 61, 165, 174, 179, 183, 190), and it was testified that since his return from service thunderstorms, fireworks, and moving pictures portraying battle scenes have caused him to become emotionally upset and nervous (R. 27, 174, 180, 188), and sometimes nauseated (R. 189).

2. *The Degree of Disability.*—The undisputed evidence shows that petitioner engaged in substantially gainful employment over a period of nearly 20 years subsequent to the date upon which he claims to have become totally permanently disabled. The employment, it is true, was intermittent and was often accomplished with difficulty, but the fact remains that throughout this period petitioner was able to engage in gainful employment. Since there is nothing to show that his condition in 1939

was substantially worse than it was in 1919, it cannot be supposed that there was any injury to petitioner's health resulting from this work.

Referring to a number of typical cases in which the principle had been applied, this Court observed in *Lumbra* v. *United States*, 290 U. S. 551, 560, that "manifestly work performed may be such as conclusively to negative total permanent disability at the earlier time", and held that the insured's performance of work for periods aggregating more than five years out of the ten immediately following the lapse of his insurance, demonstrated that he did not become totally permanently disabled while the policy was in force. See also *United States* v. *Spaulding*, 293 U. S. 498; *United States* v. *Andersen*, 88 F. (2d) 291 (C. C. A. 1st); *Theberge* v. *United States*, 87 F. (2d) 697 (C. C. A. 2nd); *United States* v. *Russian*, 73 F. (2d) 363 (C. C. A. 3rd); *Lawhon* v. *United States*, 82 F. (2d) 921 (C. C. A. 10th). As stated in the *Lawhon* case, "Nothing can be more certain than that appellant was not totally disabled during the years he was following a gainful employment" (p. 922). That proposition is self-evident and is decisive of the present controversy.

Petitioner did not regard himself as totally permanently disabled while his policy was in force, or for many years thereafter. Upon each of the several occasions calling for his statement as to the condition of his health, he represented that he was in good health except for the loss of one leg,

and that he was able to work. He so represented at the time of his discharge from service on December 30, 1918 (R. 286); in his application for compensation executed on January 6, 1919 (R. 331); in each of his applications for an automobile driver's permit (R. 321–325); in his application for private insurance (R. 337–342); and in his application for an indemnity bond (R. 333–336).

Moreover, his insistence upon vocational training as an automobile mechanic in 1921 (R. 344) is inconsistent with a belief on his part that he was totally permanently disabled, and his belated assertion of claim for disability benefits under his policy is to be taken as strong evidence that he was not totally permanently disabled while the policy was in force. *Lumbra* v. *United States,* 290 U. S. 551; *United States* v. *Spaulding,* 293 U. S. 498; *Miller* v. *United States,* 294 U. S. 435.

Furthermore, petitioner's disability is of a character ordinarily not total in nature. As pointed out in *United States* v. *Mayfield,* 64 F. (2d) 214 (C. C. A. 10th), it is "a matter of common knowledge that there are many occupations which men with one leg can successfully follow". See also *Hanagan* v. *United States,* 57 F. (2d) 860 (C. C. A. 7th); *United States* v. *Adcock,* 69 F. (2d) 959 (C. C. A. 6th).[2]

[2] Since the individual stamina, initiative, education, and opportunity of the insured are pertinent factors affecting his ability to follow substantially gainful employment, it is of no consequence that in some cases, presenting no com-

In short, the jury could have concluded from the evidence that petitioner suffered severe pains from his leg, and that his repeated employments indicate him to be a man of determination and courage. But, in view of his undisputed work record and his many representations of sound health, it could not have found substantial evidence to support the conclusion that petitioner was totally and permanently disabled in 1919.

II

THE CIRCUIT COURT OF APPEALS IN THIS CASE PROPERLY DIRECTED DISMISSAL OF THE PETITION

A. THE POWER TO DIRECT VERDICT OR JUDGMENT SURVIVED THE JURY VERDICT

The court below, having concluded that there was no substantial evidence to support the verdict of the jury, reversed the judgment entered by the District Court and remanded the cause with instructions to dismiss the petition (R. 386, 387). Such a dismissal would operate as an adjudication on the merits (Rule 41 (b)), and the mandate of the circuit court of appeals is the equivalent of a direction to enter judgment for the respondent.

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parable work record, physical impairment of the same general character shown by the evidence here has been found on the facts of those cases to constitute total and permanent disability. See *United States* v. *Dupire*, 101 F. (2d) 945 (C. A. A. 8th); *United States* v. *Rice*, 72 F. (2d) 676 (C. C. A. 8th); *Thomas* v. *United States*, 92 F. (2d) 929 (C. C. A. 5th); *United States* v. *Scarborough*, 57 F. (2d) 137 (C. C. A. 9th).

Since the adoption of the Federal Rules of Civil Procedure, this procedure raises no problems under the Seventh Amendment.[3] *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, it is true, ruled broadly that the federal courts could not enter judgment *non obstante veredicto* because of insufficiency of the evidence. See, also, *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 394. But, whatever might have been the enduring vitality of this decision, it was qualified by *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, to permit either the district court or the appellate court to direct entry of judgment in accordance with a ruling on a motion for directed verdict when the trial judge had reserved decision on the motion until after submission of the case to the jury.

Rule 50 (b) adapts the *Redman* ruling to a routine trial practice. It provides:

> Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.

This rule faithfully reflects the common law practice which formed the basis of the *Redman* ruling except in two immaterial particulars: (1) it was

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[3] Although the suit be against the United States, the statutory authorization of jury trial gives petitioner the rights which he would have in a suit against a private person. *Whitney* v. *United States*, 8 F. (2d) 476 (C. C. A. 9th). He raises the constitutional issue, but in a manner not precisely articulated (Pet. 4, 17–19).

apparently necessary at common law that the court's reservation be express (295 U. S. at 658–660); and (2) it appears that the common law reservation was accomplished with the consent of either the parties [4] or the jury.[5] Neither variation presents any question under the Seventh Amendment. The first simply substitutes a standing reservation of the legal question for the common law announcement by the court in each case, and the second simply takes for granted the consent of the parties if they do not object to the reservation announced by Rule 50 (b).[6] It is obvious that neither departs in any degree from the substance of the common law procedure. It follows that neither is condemned by the Seventh Amendment.[7]

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[4] *Reid* v. *Hoskins*, 6 El. & Bl. 953, 971 (1856) *Dublin, Wick'ow & Wexford Ry. Co.* v. *Slattery*, L. R. 3 A. C. 1155, 1199 (H. L. 1878); *Wilson* v. *Duckett*, 3 Burr, 1361 (1762).

[5] *Meatd* v. *Robinson*, Barnes 451 (1744); *Treacher* v. *Hinton*, 4 Barn. & Ald. 413 (1821).

[6] In *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, the parties did not affirmatively consent to the reservation by the court but simply were silent when the reservation was announced. No. 178, October Term, 1934; R. 145, 242.

We suppose, in the unlikely event that a party should object to the reservation, that the trial judge could bring the reservation within the four corners of the common law etiquette by obtaining the consent of the jury. We do not, of course, suggest that so pedantic an adherence to the minutiae of common law procedure is essential under the Seventh Amendment.

[7] *Walker* v. *New Mexico & Southern Pacific R. Co.*, 165 U. S. 593, 596; *Ex parte Peterson*, 253 U. S. 300, 309–310; *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494, 498; *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 657; *United States* v. *Wood*, 299 U. S. 123, 143–144.

The issue, in any event, has been settled by this Court.[8] In *Montgomery Ward & Co.* v. *Duncan*, No. 30, this Term, the Court said:

> The rule was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It does not alter the right of either party to have a question of law reserved upon the decision of which the court might enter judgment for one party in spite of a verdict in favor of the other. Prior to the adoption of the rule, in order to accomplish this it was necessary for the court to reserve the question of law raised by a motion to direct a verdict. The practice was an incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution.
>
> Rule 50 (b) merely renders unnecessary a request for reservation of the question of law or a formal reservation and, in addition, regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. It adds nothing of substance to rights of litigants hereto-

[8] The Report of the Advisory Committee on Rules for Civil Procedure to this Court, dated April 30, 1937, contained a note to the rule [then Rule 51 (b)] pointing out the apparent common law practice of obtaining the consent of the parties or of the jury to a reservation, and submitted an alternative version of the rule which would have made an express consent of the jury necessary in each case (pp. 126–127). See, also, Rule 56 of Preliminary Draft of Rules of Civil Procedure (May 1936), pp. 101–102. This more cumbersome alternative was rejected by the Court.

> fore existing and available through a more cumbersome procedure.

It is plain enough, then, that the jury verdict for the petitioner did not cut off the power of either the district court or the circuit court of appeals to rule upon the motion for a directed verdict presented by the respondent at the close of the case. That motion, it is true, was denied by the district court (R. 250–251). But under the terms of Rule 50 (b) the court nonetheless reserved its ruling, and the denial could not have been final. Both the district court and the circuit court of appeals had power after the verdict to make the proper ruling on the motion for directed verdict and to enter judgment, or direct its entry, in accordance with that ruling. The only question is whether that power was lost or should not be exercised because the respondent failed to move in the district court for judgment notwithstanding the verdict.

B. IRRESPECTIVE OF A POST-VERDICT MOTION, DISPOSITION OF THE CASE SHOULD LIE WITHIN THE DISCRETION OF THE CIRCUIT COURT OF APPEALS

Rule 50 (b), after providing for the reservation of ruling on the motion for a directed verdict, continues:

> Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict;

> * * * the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. * * *

The respondent made no motion to have the verdict and judgment set aside and to have judgment entered in accordance with his motion for directed verdict, and did not assign error to the failure of the district court to enter judgment accordingly. While the question is not free from doubt, we submit that the circuit court of appeals, whether or not there has been a post-verdict motion, should have discretion to direct a new trial, to direct entry of judgment, or to remand to the district court to decide between opposing motions for judgment and for new trial.

1. *The District Court.*—Rule 50 (b) provides that a motion to set aside a verdict shall be made within 10 days after the verdict. That motion is not an indispensable condition to the power of the district court to enter judgment in accordance with the motion for a directed verdict. For the first sentence of Rule 50 (b) operates, as we have explained, as a reservation of the ruling of the district court upon the preverdict motion for a directed verdict: the jury verdict was taken "subject to a later determination of the legal questions raised by the motion." This undoubtedly implies that the district court had power of its own motion to enter

judgment notwithstanding the verdict;[9] otherwise the reservation of its ruling would not be genuine and the operation of Rule 50 (b) would be plunged into the dubious territory of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364. If the district court takes no action on the ruling reserved by Rule 50 (b), this may be supposed to mean only that it has decided to abide by its preverdict ruling, that the motion for a directed verdict should be denied. In this view, the question is not one of the court's power but of the party's rights.

But it is unrealistic to expect a busy district judge on his own motion to revive and reconsider a ruling made in the course of the trial. At common law and under the new Rules alike, legal procedure is based upon the fundamental assumption that the judge or the jury need consider only the points at issue between the parties. Any other view would make the carefully drawn provisions of Rule 50 (b) largely unnecessary. The motion for judgment notwithstanding the verdict, to be made within 10 days after verdict, was not included simply to provide sport for counsel. Its office seems

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[9] We follow the example of the opinion in *Montgomery Ward & Co.* v. *Duncan*, No. 30, this Term, and speak of the post-verdict motion as one for judgment notwithstanding the verdict, or as one *non obstante veredicto*. The economy of expression and thought found in adoption of the common law phraseology should not, however, obscure the significant differences between the common law motion and that of Rule 50 (b). Compare *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 381.

plainly to be to force the district court once again to consider the law and the evidence and to obtain the benefit of his considered judgment on the question.

We conclude, therefore, that the Rules, in the ordinary case, do not contemplate that the district court should be expected to enter judgment notwithstanding the verdict when there has been no motion requesting such an action.

2. *The Circuit Court of Appeals.*—This, however, does not carry as a consequence the further conclusion that the appellate court is helpless to dispose of the case as justice and expedition should require.

The major issue presented to the circuit court of appeals was whether the district court erred in failing to direct verdict for the appellant. The respondent by its motion for directed verdict raised the issue whether there was any substantial evidence to support a verdict for the petitioner (R. 250). Error was assigned to the ruling of the district court denying this motion (R. 379). As we have shown, the district court erroneously decided this issue against respondent and its decision was properly reversed.

The remaining question is simply as to the proper disposition of the case on reversal when the appellant has failed to request judgment notwithstanding the verdict in the district court. On the one hand there is the natural reluctance to give a

party more than he asks; on the other hand there is the obvious undesirability of burdening the courts and the parties by granting new trials when they would be a needless protraction of litigation which should have been terminated in the appellate court.

The Circuit Court of Appeals for the Second Circuit has resolved this issue in favor of economy of litigation. Judge Learned Hand, in *Conway* v. *O'Brien,* 111 F. (2d) 611, 613, certiorari granted, October 21, 1940, said:

> It is not necessary that he should deny the motion once again; his failure to vacate his first order is enough. Hence it is proper here to dismiss the complaint.

That ruling was followed in the case at bar and in *Limbershaft Sales Corp.* v. *A. G. Spalding & Bros.,* 111 F. (2d) 675, 678 (C. C. A. 2d). No other court, so far as we have discovered, has considered the question in the absence of post-verdict motions. The phrasing of several of the opinions, however, suggests that those courts would hold such motions necessary if the question were presented to them.[10]

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[10] *Burnet* v. *S. S. Kresge Co.*, 98 Dept. Justice Bulletin; Rule 50 (C. C. A. 7th); *Southern Railway Co.* v. *Bell*, 114 F. (2d) 341 (C. C. A. 4th); *Reliance Life Ins. Co.* v. *Burgess*, 112 F. (2d) 234 (C. C. A. 8th); *Lowden* v. *Denton*, 110 F. (2d) 274, 278 (C. C. A. 8th); *Ferro Concrete Construction Co.* v. *United States*, 112 F. (2d) 488, 492 (C. C. A. 1st); *Reliance Life Ins. Co.* v. *Burgess*, 112 F. (2d) 234, 240 (C. C. A. 8th); cf. *Massachusetts Protective Ass'n* v. *Mouber*, 110 F. (2d) 203, 207 (C. C. A. 8th).

The proceedings on the Federal Rules of Civil Procedure, held under the auspices of the American Bar Association and other associations, do not deal explicitly with this point. However, they contain discussions which assume that post-verdict motions would be made and some of which suggest that they might be necessary.[11]

One can argue both ways from *Baltimore & C. Line* v. *Redman*, 295 U. S. 654. There the petitioner made a motion to set aside the verdict, which was denied together with the reserved motion for a directed verdict (No. 178, October Term, 1934; R. 260). But it also seems significant that the opinion of this Court does not stop to include this post-verdict motion in its summary of the procedural steps (295 U. S. at 656) and proceeds throughout upon the assumption that the power both of the district court and the appellate

[11] William D. Mitchell, Chairman of the Advisory Committee, said that under Rule 50 (b) the district judge is deemed to reserve the ruling "and consequently may on motion afterwards set aside the verdict, grant judgment notwithstanding, and the circuit court of appeals may take the same action." *Cleveland Proceedings*, p. 315. Again, he said: "* * * the trial court may later entertain a motion for judgment notwithstanding the verdict, and if that is denied the appellate court on review may reverse and order judgment without a new trial." *New York Proceedings*, p. 283. Judge W. Calvin Chesnut said that the party who moved for a directed verdict can, after verdict, "move for the entry of a judgment in his favor, *non obstante veredicto*, and if the trial judge goes wrong about that, the appellate court can set him right and give the proper judgment." *Washington Proceedings*, p. 87.

courts to direct entry of judgment rested alone on the reservation of the ruling on the motion for a directed verdict.[12]

One is left, then, with a question which seems to present competing considerations of policy and must be resolved on the basis of equivocal authority. We suggest a procedure which should measurably achieve both ends of policy: We believe the appellate court, when it has reversed for failure to direct verdict, whether or not there has been a motion for judgment notwithstanding, should have full discretion to direct a new trial, to direct entry of judgment, or to remand the cause to the district court for decision as to the disposition of the cause, presumably on the basis of opposing motions for judgment and for new trial. See R. S. § 701 (and Act of March 3, 1891, § 11, 26 Stat. 829); *Archer* v. *Eldridge,* 204 Mass. 323, 327; *Vallavanti* v. *Armour & Co.,* 264 Mass. 337, 341–342.

(a) The circuit court of appeals, when it reverses for errors of law in the course of the trial, such as the admission or exclusion of evidence, will of course direct that a new trial be had. *Montgomery*

[12] The common law practice differed markedly in its procedural details from that contemplated by the Rules, and contains no useful analogy as to the necessity of a post-verdict motion. It contemplated that the reserved ruling would be considered not at *nisi prius* but by the court *en banc*, as a part of the issues included in the customary rule *nisi*. See the discussion of Lord Blackburn in *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery,* L. R. 3 A. C. 1155, 1204–1205; Thayer, *Evidence*, 241–244; Tidd, *Practice* (London 1850), II, 904–905.

Ward & Co. v. *Duncan,* No. 30, this Term (pamph. p. 8). Even if the reversal be because of the absence of substantial evidence to support the verdict, justice may sometimes indicate that a new trial should be directed.[13] If the appellee makes a sufficient showing to the circuit court of appeals that a new trial is appropriate, it plainly lies within the discretion of the court to direct a new trial on reversal, even though there is power to direct entry of judgment. Cf. *Toledo Co.* v. *Computing Co.,* 261 U. S. 399–419–421; *Washington Gas Co.* v. *Lansden,* 172 U. S. 534, 536.

(b) On the other hand, if there be no reason for a new trial, it seems an unnecessary burden on the judicial system to refuse to direct entry of judgment for an appellant who has failed to make the post-verdict motion contemplated by Rule 50 (b). Even if it be viewed as an appropriate penalty for negligent counsel, there is no justification for increasing the litigation burden in the federal courts

[13] The situations in which a new trial may be appropriate even though, by definition, the party was not injured in the eyes of the jury are probably atypical but are nonetheless a real possibility. Examples, selected more or less at random, are: adoption of a new theory in the charge or in the appellate court (see *Norton* v. *City Bank & Trust Co.*, 294 Fed. 839 (C. C. A. 4th)); refusal of continuance (see *Vaughn* v. *Charpiot*, 213 S. W. 950 (Tex. Civ. App.)); surprise (see *Preston* v. *Mutual Life Ins. Co.*, 71 Fed. 467 (D. Mass.)); excusable absence of attorney (see *Kilts* v. *Neahr*, 101 App. Div. 317), or witness (see *Ellis* v. *Hearn*, 132 App. Div. 207); and misconduct of attorney (see *Buntin* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 54 Mont. 495) or witness (see *Moore* v. *Cross*, 86 Vt. 148, 150).

when a case should plainly be terminated in the appellate court.[14] And there is no more likelihood of injustice to the occasional appellee who, although he has received the verdict, is entitled to a new trial because of unfairness in the original trial, than there is in the case of the appellee who has successfully withstood a post-verdict motion in the district court to have the judgment set aside. Yet, in those cases, there is unquestioned power to direct entry of judgment.[15] It seems that any other construction, requiring the unnecessary burden of new trials simply because of the failure of counsel to make a post-verdict motion, would be forbidden by the general canon of interpretation found in Rule 1, requiring that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

(c) Finally, there may occasionally be cases in which the circuit court of appeals would be doubtful as to the correct disposition of the case. The appellee might suggest reasons of justice why there should be a new trial which were not conclusive but which might cause the appellate court to hesitate to direct entry of judgment. In such a case, the

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[14] In some cases, the failure to move in the district court after verdict might appropriately be considered by the appellate court in determining how to dispose of the case.

[15] See *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 661; *Montgomery Ward & Co.* v. *Duncan*, No. 30 this Term (pamph. p. 8); *Leader* v. *Apex Hosiery Co.*, 108 F. (2d) 71, 81 (C. C. A. 3d), affirmed, 310 U. S. 469, and the ten decisions of five circuit courts of appeals cited, in text and note, *supra*, p. 26.

district court would be peculiarly fitted to determine the course indicated by considerations of justice.[16] The circuit court of appeals, in this situation, might appropriately remand the cause to the district court to determine on opposing motions whether judgment should be entered for the appellant or whether there should be a new trial. See *Grobenstein* v. *Stone & Webster Co.*, 205 Mass, 431, 440–441.

If choice between these alternative dispositions of the cause be left to the discretion of the circuit court of appeals there would be combined, we believe, the expedition contemplated by the new rules and the protection of every substantial right of either party.

C. THE CIRCUIT COURT OF APPEALS IN THIS CASE PROPERLY DIRECTED DISMISSAL OF THE PETITION

If we are correct in our view that the circuit court of appeals had discretion as to the disposition of the case, even though respondent made no post-verdict motion in the district court, its decision that dismissal of the petition should be directed will not be reviewed here except on claim of abuse of discretion. See *Burnet* v. *Desmornes*, 226 U. S. 145, 148; *Santos* v. *Roman Catholic Church*, 212 U. S. 463, 465; cf. *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 485.

[16] Compare the familiar rule that the grant or denial of a new trial lies within the discretion of the district court and will not be reviewed except for abuse of discretion. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 485.

But it may be that this Court, by virtue of having before it the entire record, on a review substantially as broad as that in the circuit court of appeals, should itself determine whether entry of judgment or a new trial should be directed. In that event, it seems plain not only that the verdict should have been directed for the respondent but that the court below properly disposed of the cause.

Under the circumstances of this case there is no permissible alternative to a judgment in respondent's favor. The evidence, showing that petitioner had engaged in substantially gainful employment over extended periods of time, conclusively negatives petitioner's claim that he became totally and permanently disabled prior to the performance of this work.

Because it thus appears on the face of the record that the sole issue decisive of petitioner's claim could not be resolved in his favor even if a new trial were granted, the litigation should be terminated. Remand of the case to the district court for any further proceedings would be futile, since there are no grounds upon which the granting of a new trial, either for errors of law or as a matter of discretion, would be justified.

While we believe it to be plain that, if petitioner were granted a new trial, he could not make out a case warranting submission of the issue of total permanent disability to the jury, it may be pointed out that, even if weakness of evidence were grounds for a new trial, adequate opportunity to produce

additional evidence was presented petitioner during the sixteen months elapsing between the first and the second trials.

Petitioner has suggested, neither in the court below nor in this Court, any reason why it would be unfair to him to refuse a new trial. If, on oral argument, any persuasive reasor for a new trial should be advanced, we would not argue that entry of judgment should be directed, but at the most would suggest that the cause should be remanded to the district court for decision as to judgment or new trial.

Accordingly, we submit that any order by the circuit court of appeals except the order of dismissal would necessarily result in nothing more favorable to petitioner than protracted litigation and useless expense, and that the order to enter judgment of dismissal should therefore be affirmed.

D. EVEN IF THE CIRCUIT COURT OF APPEALS WOULD ORDINARILY BE UNABLE TO DIRECT DISMISSAL OF THE PETITION, BECAUSE OF THE ABSENCE OF A POST-VERDICT MOTION, IT WAS PROPER TO DO SO IN THIS CASE

Finally, we suggest that even though the preceding analysis should be wrong, the circuit court of appeals in this case properly directed dismissal of the petition notwithstanding the respondent's failure to move after verdict for entry of judgment.

Rule 10 of the Rules of the United States Circuit Court of Appeals for the Second Circuit provides, in part, that "the court, at its option, may notice plain error not assigned." This reflects a general

rule of appellate litigation. See *United States* v. *Tennessee and Coosa Railroad Co.*, 176 U. S. 242, 256; *Pierce* v. *United States*, 255 U. S. 398, 406; *A. Santaella & Co.* v. *Otto F. Lange Co.*, 155 Fed. 719, 724 (C. C. A 8th); *Baltimore & Ohio R. Co.* v. *McCune*, 174 Fed. 991, 992 (C. C. A. 3d).

We have shown that, irrespective of any post-verdict motion by the respondent, the district court had full power to enter judgment notwithstanding the verdict (*supra*, pp. 23–24). In the present case, the failure of the district court to enter such a judgment was plain error. The verdict, as the court below ruled, should have been directed for respondent, and nothing appears in the record or has been suggested by the petitioner to indicate that a new trial should be granted for reasons of justice. Accordingly, even in the absence of a post-verdict motion by respondent, the circuit court of appeals had power to correct the plain error of the district court in failing to enter judgment for the respondent.

CONCLUSION

It is respectfully submitted that respondent's motion for a directed verdict should have been granted, and that the judgment of the circuit court of appeals should be affirmed, or, in any event, that the judgment of the circuit court of appeals should be modified only to the extent of ordering remand of the case for consideration

by the district court as to whether a new trial should be granted.

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JANUARY 1941.

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SUPREME COURT OF THE UNITED STATES.

No. 336.—October Term, 1940.

Leroy A. Berry, Petitioner, *vs.* United States of America.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 3, 1941.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner sued the United States in a federal district court, alleging that he became totally and permanently disabled prior to ~~November~~ December 31, 1919, while his policies of War Risk Insurance were in force and effect.[1] Trial was had and evidence heard. The trial judge declined to grant the government's request for a directed verdict in its favor. The jury found for petitioner. The government, without having made any motion either for a new trial or for judgment notwithstanding the verdict, took the case to the Circuit Court of Appeals. Upon review that court held plaintiff had not produced sufficient evidence to justify submission of the cause to the jury. The court did not, however, remand the case to the District Court for further proceedings, but reversed the judgment and dismissed the cause of action.[2]

The petition for certiorari presented two questions: First, whether there was sufficient evidence to sustain the verdict; Second, whether the Circuit Court of Appeals erred in dismissing the cause instead of remanding it for a new trial. This second question invoked our jurisdiction in order to obtain an authoritative construction of subdivision (b) of Rule 50 of the Rules of Civil Procedure. In part that subdivision provides: "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to

[1] Though petitioner alleged that his policies were in effect until ~~November~~ December 31, 1919, in reality it was necessary for him to show that he became totally and permanently disabled prior to September 1, 1919. This variance in dates is not material, however.

[2] 111 F. (2d) 615.

have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . ." Since the government made no such motion within 10 days after the verdict, petitioner urged here that the Circuit Court of Appeals was without power to dismiss the cause but should have remanded it for a new trial. But while this important point, upon which the Circuit Courts of Appeals are not in complete agreement,[3] is one of the two questions upon which the petition for certiorari rested, there is no occasion for us to reach it here. For we find that there was sufficient evidence to sustain the jury's verdict, and we hold that the District Court properly denied the government's motion for a directed verdict in its favor.

Rule 50(b) goes further than the old practice[4] in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the jury's without granting a new trial.[5] But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact[6]—a jury being the constitutional tribunal provided for trying facts in courts of law. Here, although there was evidence from which a jury could have reached a contrary conclusion, there was testimony from which a jury could have found these to be the facts: Petitioner suffered injuries on June 16, 1918, while serving in the front lines in France. On that date, in the early morning hours, bits of shrapnel wounded

[3] Compare Conway *v.* O'Brien, 111 F. (2d) 611, 613 (C. C. A. 2d), reversed this day, with Pruitt *v.* Hardware Dealers Mutual Fire Ins. Co., 112 F. (2d) 140, 143 (C. C. A. 5th). And see United States *v.* Halliday, decided January 9, 1941 (C. C. A. 4th).

[4] Compare Slocum *v.* New York Life Insurance Co., 228 U. S. 364, with Baltimore & Carolina Line *v.* Redman, 295 U. S. 654.

[5] The relevant portion of the rule provides: "If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed."

[6] See Gunning *v.* Cooley, 281 U. S. 90, 94; Richmond & Danville R. R. *v.* Powers, 149 U. S. 43, 45; Texas & Pacific Ry. *v.* Cox, 145 U. S. 593, 606; Railroad Co. *v.* Stout, 17 Wall. 657, 663.

him in the right arm, right shoulder, right hip and in front of the right ear. He was helped to a dugout by another soldier. There he found others who were wounded. About fifteen minutes after he arrived at the dugout, another shell struck, immediately in front of the dugout door. All the nine or ten men present were either killed outright or were so badly wounded that they were unable to leave. Petitioner's left leg was practically cut off below the knee. He twisted a part of his wrapped leggings around his wound to stop the bleeding. About six and one-half hours later he was taken on a stretcher and carried back to the First Aid Station. There his wounds were temporarily dressed. After another six or seven hours, he was carried to the hospital. Shortly thereafter an operation followed and his left leg was removed. He underwent several operations in the hospitals in France, leaving that country for the United States in August of 1918 and arriving in Boston on September 7. He was treated in hospitals in the United States until about Christmas, 1918. During the years between the time of the injury and the time of the trial, petitioner suffered repeatedly from abscesses and blisters on the stump of his left leg, and his right leg has caused him inconvenience, suffering and disability. In addition his nervous system has shown serious and continuous impairment, so much so that the Circuit Court of Appeals properly said, "Certain it is that he was neurasthenic, and had uncontrollable accesses of terror at any explosion, or even during thunder-storms." There has never been a time since his injuries when he could do work which required him to stand upon or use the stump without having it blistered, chafed or abscessed within two days. Several physicians who examined and treated him through the years were of opinion that he would never be able to work continuously at a gainful occupation because of his condition, and that he had never been able so to work since the wound was received. The government gave him vocational training both in photography and in automobile repair work. He tried both, but from his own evidence, corroborated by that of his employers in many instances, the jury could have found that in spite of his determination to succeed, he was physically unable to do so. He bought a farm. He was compelled to depend on the work of his own family and relatives in this undertaking, but the venture was

a failure and he lost the farm. He tried to operate a garage in partnership with another. In this, too, he was unsuccessful, and the jury could have found that his failure was atributable to his physical disabilities. For a time he was engaged as a salesman of aluminum cooking utensils. But here again the jury could have found that his contribution to the venture was small. For as elsewhere, there was testimony tending to show that it was a member of his family, in this instance his wife, whose labors made it possible for this activity to be carried on. Taking the evidence as a whole, the jurors, who heard the witnesses and personally examined the petitioner's wounds, could fairly have reached the conclusion that since his injuries petitioner never had been able, and would not be able thereafter, to work with any reasonable degree of regularity at any substantially gainful employment. The trial judge, who had the same opportunity as the jury to hear the witnesses, denied the government's motion for a directed verdict and correctly instructed the jury what they must find from the evidence in order to return a verdict for petitioner.[7]

It was not necessary that petitioner be bed-ridden, wholly helpless, or that he should abandon every possible effort to work in order for the jury to find that he was totally and permanently disabled.[8] It cannot be doubted that if petitioner had refrained from trying to do any work at all, and the same evidence of physical impairment which appears in this record had been offered, a jury could have properly found him totally and permanently disabled. And the jury could have found that his efforts to work

[7] The government expressed satisfaction with the trial judge's charge, which, as to total and permanent disability, contained this statement: "A total disability is any physical or nervous injury which makes it impossible for a person to follow continuously a substantially gainful occupation at any kind of work for which he was competent or qualified, physically and mentally, or for which he could qualify himself by a reasonable amount of study and training. The word 'total' as applied to 'disability' does not necessarily mean incapacitated to do any work at all. The word 'continuously' means with reasonable regularity. It does not preclude periods of disability which are ordinarily incident to activities of persons in generally sound health, for nearly all persons are at times temporarily incapacitated by injuries, or poor health, from carrying on their occupations. If Berry was able to follow a gainful occupation only spasmodically, with frequent interruptions, due to his injuries, and his shock, he was totally disabled. A disability is permanent when it is of such a nature that it is reasonably certain it will continue throughout a person's lifetime."

[8] Lumbra *v.* United States, 290 U. S. 551, 559-560.

ll of which sooner or later resulted in failure—were made not ause of his ability to work but because of his unwillingness to e a life of idleness, even though totally and permanently dis-led within the meaning of his policies.[9] Nor does the fact that waited thirteen years before bringing suit stand as an insuper-e barrier to his recovery. His case was not barred by any statute limitations. Whatever weight the jury should have given to circumstance of petitioner's delay in filing his claim, that ght was still for their consideration in connection with all the er evidence in the case.

There was evidence from which a jury could reach the conclu-n that petitioner was totally and permanently disabled. That s enough. The judgment of the Circuit Court of Appeals is re-rsed, and that of the District Court is affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END

[9] See United States *v.* Rice, 72 F. (2d) 676, 677; Nicolay *v.* United States, F. (2d) 170, 173; United States *v.* Lawson, 50 F. (2d) 646, 651; United tes *v.* Godfrey, 47 F. (2d) 126, 127; United States *v.* Phillips, 44 F. (2d) , 691.